

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

AMERICAN FIRE & INDEMNITY COMPANY,

Plaintiff,

v.

NO. 1:98CV258-S-D

SCOTTSDALE INSURANCE COMPANY,

Defendant.

OPINION

This case involves a coverage dispute between two insurance companies. Presently before the court are the parties' cross-motions for judgment on the pleadings.

BACKGROUND

On October 16, 1996, Dorothy V. Taylor was fatally injured in a one-vehicle accident while a passenger in a vehicle owned and operated by her husband Calvin E. Taylor. At the time of the accident, Calvin had in force and effect two insurance policies. The first was a personal automobile policy issued by American Fire & Indemnity Company covering the subject vehicle. That policy provided liability coverage with per person bodily injury liability limits of \$250,000.00. However, it excluded liability coverage "for bodily injury to you or any family member." As Calvin's wife, Dorothy came within the policy definition of "family member," and therefore, no liability coverage existed for her death. The parties agree that such exclusionary language is valid and enforceable. *See Thompson v. Mississippi Farm Bureau*, 602 So.2d 855, 857 (Miss. 1992).

The American Fire policy also contained an uninsured motorist endorsement pursuant to the requirements of the Mississippi Uninsured Motorist Act, Miss. Code Ann. §§ 83-11-101 *et seq.* Under the provisions of that endorsement, American Fire agreed to pay damages which an insured became legally entitled to recover from the owner or operator of an uninsured motor vehicle. The per person bodily injury limits under the UM coverage was \$250,000.00, but because the policy

listed three vehicles, American Fire concedes that the stacked UM coverage increased to \$750,000.00 per person. *See United States Fidelity & Guaranty Company v. Ferguson*, 698 So.2d 77 (Miss. 1997) (reaffirming viability of stacking UM coverage and finding anti-stacking clauses violative of Mississippi public policy).

In addition to the American Fire policy, Calvin also had in effect a personal umbrella liability policy issued by Scottsdale Insurance Company which provided liability coverage with limits of \$1,000,000.00 per accident. That policy provided (1) excess insurance over and above the amounts provided for in basic policies (excess coverage provision), or (2) damages exceeding \$1,000.00 arising out of claims excluded or not covered under basic policies (gap-filling provision). As noted on the declarations page, Scottsdale required that the “basic [automobile liability] polic[y]” consist of minimum limits of bodily injury coverage of \$250,000.00 per person. A “basic policy” is defined as “a policy...listed on the declarations...which provides liability coverage for Personal Injury...because of accidents.”

After the accident, Dorothy’s wrongful death beneficiaries and her estate claimed that the accident was caused by Calvin’s negligence and sought damages from him pursuant to either one or both of the insurance policies at issue. American Fire contended that since liability coverage was excluded under the family member exclusion and the vehicle was not uninsured, under its interpretation of the policy, Scottsdale was obligated to provide coverage under the gap-filling provision of its umbrella policy. In response, Scottsdale maintained that it provided excess coverage only since the policy did not, in the language of the policy itself, “‘drop down’ to assume the obligations of any basic policy if any basic policy is not collectible for any reason” and also because the UM portion of the American Fire policy constituted “other collectible insurance” which had to be exhausted before resort to the umbrella policy.

Though the companies disputed which policy afforded coverage, they nevertheless entered into settlement negotiations with the decedent’s beneficiaries while reserving the right to litigate between themselves the ultimate liability for any settlement which might be reached and to seek

reimbursement from the other for their respective settlement contributions. A settlement of the wrongful death claim was ultimately reached in the sum of \$500,000.00, with American Fire paying \$300,000.00 of that figure and Scottsdale paying the remainder.

This declaratory judgment action ensued seeking an adjudication by American Fire that Scottsdale is liable for the entire claim under the umbrella policy issued to Calvin and requesting judgment of \$299,000.00 from Scottsdale as reimbursement. Scottsdale counterclaimed seeking judgment in its favor in the amount of \$200,000.00. Presently before the court are the parties' cross-motions for judgment on the pleadings.

### DISCUSSION

The parties agree in one regard: there is no definitive law in this jurisdiction or any other on the issue of which layer of coverage applies next in this case. The court begins its analysis with these two points. First, as the parties acknowledge, there is no liability coverage under the American Fire policy because of the family member exclusion. Second, when coverage is "excluded or not covered" under the required basic liability policy, the Scottsdale policy provides coverage for damages exceeding \$1,000.00. Scottsdale can avoid this result only in two situations: (1) where there is "other collectible insurance," in which case, the Scottsdale policy becomes excess to the other insurance; and (2) where the underlying basic liability policy is not "collectible for any reason, including but not limited to the insolvency of the company by whom the basic policy was issued." It is to these two situations the court now turns.

Scottsdale argues that the UM coverage provided by American Fire is "other collectible insurance." To reach that result, however, the court must first find that Calvin's vehicle was an uninsured motor vehicle under Mississippi law. Only two of the five definitions in Miss. Code Ann. § 83-11-103(c) bear analysis, and neither supports a conclusion that this vehicle was uninsured. First, under Miss. Code Ann. § 83-11-103(c)(ii), an "uninsured motor vehicle" is defined as "[a] motor vehicle as to which there is [bodily injury liability] insurance in existence, but the insurance company writing the same has legally denied coverage...." Certainly, if only the American Fire

policy were at issue, then Calvin's vehicle would be uninsured since American Fire provided liability coverage under usual circumstances, but because of the family member exclusion and the status of the decedent, it legally denied coverage in this case. However, it is not the only liability policy at issue. Indeed, Scottsdale denominates its policy as a "personal umbrella liability policy" providing either excess or gap-filling coverage "[f]or accidents caused by the use of automobiles," and though it is a fine point, Scottsdale has not technically "denied" covered but only argued the excess nature of the coverage provided. Calvin's vehicle is therefore not uninsured under (c)(ii).

Second, under § 83-11-103(c)(iii), this vehicle was not underinsured. That determination is made "solely by comparing policy limits—that is, the liability limit of the tortfeasor compared to the UM limit applicable to the injured party." *Dixie Insurance Company v. State Farm Mutual Automobile Insurance Company*, 614 So.2d 918, 920 (Miss. 1992). Though the liability portion of the American Fire policy provided no coverage, the Scottsdale policy affords liability coverage of \$1,000,000.00. The aggregate UM limits available to the decedent are, as outlined above, \$750,000.00. Since the liability coverage available by virtue of the Scottsdale policy exceeds the available UM coverage, Calvin's vehicle was not uninsured. Therefore, because Calvin's vehicle was not uninsured at the time of the accident under the Mississippi UM statute, there existed no "other collectible insurance" to which the Scottsdale policy could be excess.

Scottsdale next seeks to avoid liability by reference to the "drop down" provision of the policy which provides, "This policy will not 'drop down' to assume the obligations of any basic policy if any basic policy is not collectible for any reason, including but not limited to the insolvency of [American Fire]." Under the interpretation offered by Scottsdale, the American Fire policy is "not collectible" because coverage was excluded or not covered based on the family member exclusion; therefore, the Scottsdale policy does not "drop down" to provide coverage not available under the underlying basic policy. If the court were to accept that analysis, the gap-filling provision of the Scottsdale policy, which pays damages when liability coverage under the basic policy is "excluded or not covered," would be completely vitiated. Indeed, after exhaustive research, the court can find

no case in which any court has given the phrase “not collectible for any reason” the connotation which Scottsdale advances or found it otherwise to be synonymous with “excluded or not covered.” Instead, the cases addressing similar “drop down” clauses universally find to the contrary. *See, e.g., Mission National Insurance Company v. Duke Transportation Company*, 792 F.2d 550, 553 (5th Cir. 1986) (the terms “covered” or “not covered” apply where “the terms of the underlying policy do not provide coverage for the occurrence...in question” as compared to whether benefits are collectible); *Pergament Distributors, Inc. v. Old Republic Insurance Company*, 128 A.D.2d 760, 761, 513 N.Y.S.2d 467 (N.Y. App. Div. 1987) (“‘covered’ or ‘not covered’ refer to whether the policy insures against a certain risk, not whether the insured can collect on an underlying policy”). The “drop down” clause therefore has no application, and Scottsdale is liable for the entire settlement with Dorothy’s beneficiaries, less \$1,000.00, under the gap-filling provision of the umbrella policy

#### CONCLUSION

Having carefully considered the matter, the court finds (1) that the defendant Scottsdale Insurance Company does provide liability coverage with limits up to \$1,000,000.00 under the personal umbrella liability policy issued to Calvin E. Taylor for the claim for the alleged wrongful death of Dorothy V. Taylor; (2) that the plaintiff American Fire & Indemnity Company has no coverage under its liability policy and uninsured motorist endorsement for the alleged wrongful death of Dorothy V. Taylor; and (3) that American Fire is entitled to recover from Scottsdale the sum of \$299,000.00, as reimbursement for its respective portion of the joint settlement amount paid by American Fire and Scottsdale for the alleged wrongful death of Dorothy V. Taylor. The motion of American Fire for judgment on the pleadings is therefore well taken and is granted; the cross-motion for judgment on the pleadings of Scottsdale is denied.

An appropriate order and final judgment shall issue.

This \_\_\_\_\_ day of June, 2000.

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SENIOR JUDGE